UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

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Last Week's Pledge-of-Allegiance Decision

Was the Ninth Circuit Off Base – Or Merely Following the Course of Precedent?

There are several ways of looking at last week's decision from the 9th Circuit which held *both* that the text of the Pledge of Allegiance is unconstitutional, and that voluntary, teacher-led recitations of the Pledge in a public school are unconstitutional. It was the Pledge's assertion that we are "one Nation *under God*" that the judges found offensive.

First, one can believe that the two judges who made the decision are fools. This view was strongly asserted by several Senators who took to the floor.

Second, one can believe that the judges ignored winks and nods from the Supreme Court that were intended to imply that the Pledge and National Motto ("In God we trust") are exempt from the normal constitutional tests that the Court has used to strike down numerous practices involving God or religion at public schools.

Third, and perhaps the most compelling view, is that the judges followed the law as they saw it – and that they merely took the next step along the course that the Supreme Court has set. The *Washington Post* quoted a professor of law who said the decision "is eminently defensible" because the judges were "applying principles the Supreme Court has established."

Remember, it was just two years ago that the Supreme Court held that a student-led, student-initiated prayer at a public high school's football games violated the Establishment Clause. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

In 1992, the Supreme Court held that nonsectarian prayers offered by a rabbi at a public middle school's graduation ceremony (which students were *not* required to attend) violated the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577 (1992).

Any lawyer can point to facts that would make the Pledge case *even more* constitutionally compelling than *Santa Fe School District* and *Weisman*. In the Pledge case, the "forbidden words" were spoken *daily* in an *elementary school* by a *familiar, government-paid authority figure* as part of an *official, in-school* program, and attendance at school is *compulsory* (but saying the Pledge cannot be made compulsory, *W. Va. State Bd. Ed. v. Barnette*, 319 U.S. 624 (1943)).

It is true that the Supreme Court has hinted that the saying of the Pledge in public school may be okay, even with its "one Nation *under God*" phrase. Yet those hints were weak (and, of course, in *dicta*). *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 602-03 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n. 5 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); *id*. at 716 (Brennan, J., dissenting); *School District of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); see also, *Engel v. Vitale*, 370 U.S. 421, 435 n. 21 (1962).

The 7th Circuit found those hints sufficient in its "one Nation *under God*" case, *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (1992). Last week, the 9th Circuit explained to its satisfaction how its sister circuit had gone astray. *Newdow v. U.S. Congress, et al.*, – F.3d –, No. 00-16423 (9th Circ., filed June 26, 2002) (stayed pending appeal).

At the U.S. Supreme Court, several justices have doubted their colleagues' assurances about the Pledge. In *County of Allegheny, supra*, 492 U.S. at 672, Justice Kennedy (for himself and three other Justices) feared that the majority's rationale for its decision would put the Pledge at risk because "the reasonable atheist" would "feel less than a full member of the political community every time his fellow Americans recited" the Pledge. That is just what the 9th Circuit concluded.

In *Wallace v. Jaffree, supra*, 472 U.S. at 88, Chief Justice Burger asked, "Do the several opinions in support of the judgment today render the Pledge unconstitutional?" He thought that would indeed "be the consequence of" the Court's method of reading statutes.

When *Lee v. Weisman* struck down prayers at a graduation ceremony, Justice Scalia (writing for himself and three others), 505 U.S. at 638-39, ***argued that the same rationale would have to apply to the Pledge***, which the students had recited just before hearing the invocation:

> "The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Moreover, since the Pledge of Allegiance has been revised since *Barnette* to include the phrase 'under God,' recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction.
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> If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In *Barnette* we held that a public school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence – indeed, even to stand in respectful silence – when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer."

There may be several explanations for what the 9th Circuit did last week – and one of the better is that the court was just following the path of precedent laid down by the Supreme Court.

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